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No. 91-1390

In The

Supreme Court Of The United States

October Term, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, ET AL.,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether review of this matter on certiorari is appropriate in view of the well settled law that the Connecticut Environmental Protection Act, Conn. Gen. Stat. §§ 22a-14-22a-20 did not confer an enforceable property right upon West Farms to sustain this action?

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STATEMENT OF THE CASE

West Farms Associates ("West Farms"), filed this action against the Connecticut State Traffic Commission (STC); J. William Burns, Commissioner of the Connecticut Department of Transportation; Bernard R. Sullivan, Commissioner of the Connecticut Department of Public Safety; Lawrence F. DelPonte, Commissioner of the Connecticut Department of Motor Vehicles; the Connecticut Department of Transportation (ConnDOT) ("State Defendants")[1]; and Wilmorite, Inc. ("Wilmorite") seeking declaratory and injunctive relief with respect to the manner in which the STC is processing Wilmorite's application for a certificate of operation under Section 14-311 of the Connecticut General Statutes. West Farms sought to stop the STC from conducting an administrative review of Wilmorite's application. In the Amended Complaint, West Farms alleged that:

1. The STC did not have any rules or regulations regarding the review and approval of Section 14-311 applications. West Farms also claimed a "property interest" in the Connecticut administrative proceedings at issue and argued that it was deprived of this property right without due process of law in contravention of the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983.

2. Meetings and other correspondence between STC staff and Wilmorite representatives prior to the hearing stage,

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[1] Since the initiation of this action, the Commissioner of the Connecticut Department of Transportation, Commissioner of the Connecticut Department of Public Safety, and Commissioner of the Connecticut Department of Motor Vehicles have been replaced. Therefore, on May 22, 1991, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, J. William Burns, Bernard R. Sullivan and Lawrence F. DelPonte were substituted as parties to the action by order of the District Court. The new parties are Emil H. Frankel, Commissioner of the Connecticut Department of Transportation, Nicholas A. Cioffi, Commissioner of the Connecticut Department of Public Safety, and Louis S. Goldberg, Commissioner of the Connecticut Department of Motor Vehicles.

without prior notice to and an opportunity for West Farms to directly participate, constituted prohibited "*ex parte*" communications that denied West Farms due process and equal protection of the law in violation of the Fourteenth Amendment and also denied West Farms the "right to petition" the government in violation of the First Amendment.

Both the State Defendants and Wilmorite moved to dismiss the lawsuit. The District Court dismissed the action on the grounds that West Farms failed to allege a property interest sufficient to sustain its due process and equal protection claims, and that West Farms failed to allege a claim of any violation of its "right to petition."

Thereafter, West Farms filed a notice of appeal to the United States Court of Appeals for the Second Circuit. On December 3, 1991, the Court of Appeals upheld the District Court's decision dismissing the lawsuit and held that the Connecticut Environmental Protection Act did not confer a property right upon West Farms and West Farms was not deprived of any First Amendment rights. *West Farms Associates v. State Traffic Commission of the State of Connecticut*, 951 F.2d 469 (2nd Cir. 1991).

West Farms has filed a petition for a writ of certiorari and the State Defendants now present this opposition to the granting of such writ.

STATEMENT OF THE RELEVANT FACTS

The essential facts of this case are not in dispute. This case involves a dispute over the administrative review being conducted by the STC regarding an application that Wilmorite filed under Section 14-311 of the Connecticut General Statutes seeking a certificate of operation for a proposed shop-

ping center to be constructed in the Town of Plainville, Connecticut.[2]

The STC is an administrative agency of the State of Connecticut which consists of three state commissioners and an administrative staff. Conn. Gen. Stat. § 14-298. The STC is responsible for processing applications for certificates of operation from major traffic generators. The primary function of the STC is to ensure that the operation of a major traffic generator will not adversely impact public safety. Conn. Gen. Stat. § 14-311.

On March 28, 1989, Wilmorite submitted an application for certificate regarding the proposed construction and operation of a shopping center in the Town of Plainville (i.e., "Plainville Mall"). In response to Wilmorite's application, there had been several informal meetings and discussions between STC staff, ConnDOT staff and Wilmorite as part of an administrative investigation of the application and the impact of the mall on the state highways.

On December 1, 1989, West Farms filed a notice of intervention and petition to be designated a party pursuant to Conn. Gen. Stat. § 22a-14 *et seq.* which permits "any person, partnership, corporation . . . or other legal entity" to intervene in any administrative proceeding in order to raise environmental impact issues. Conn. Gen. Stat. § 22a-19. Intervention for § 22a-14 purposes was granted at a public meeting of the STC Commissioners on December 19, 1989. In addition to intervention for environmental purposes, West Farms was allowed to participate in any meeting of the STC Commissioners

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[2] Section 14-311(a) provides: No person, firm, corporation, state agency, or municipal agency or combination thereof shall build, expand, establish or operate any open air theater, shopping center or other development generating large volumes of traffic, having an exit or entrance on, or abutting or adjoining, any state highway or substantially affecting state highway traffic within this state until such person or agency has procured from the state traffic commission a certificate that the operation thereof will not imperil the safety of the public.

regarding Wilmorite's application, to receive notice of all related STC matters, and to present related information for the STC and ConnDOT staffs' consideration.

While the administrative process was continuing, and before any public meeting or decision on Wilmorite's application occurred, West Farms instituted this federal action. West Farms owns a shopping center located approximately 6 miles from the proposed Plainville Mall and would be in direct commercial competition with the Plainville Mall.

In the instant lawsuit, West Farms claimed a property interest in the Wilmorite review, analysis and investigation stage of the proceedings at the STC staff level. West Farms has characterized informal discussions between STC staff and Wilmorite as "*ex parte*" and claimed a right to be part of all such discussions. This claim was advanced despite the fact that the application was only in the stage of preliminary review by STC staff and had not been presented to the STC Commissioners for their review and decision. In addition, as a result of this claimed property interest, West Farms also alleged a denial of due process stemming from the STC's lack of state regulations.

On September 5, 1991, the STC held a special public meeting to consider Wilmorite's application for an STC traffic certificate. All interested persons were in attendance, including West Farms, and all were offered the opportunity to address the STC. At the conclusion of the meeting, the STC voted to grant a traffic certificate to Wilmorite for the operation of the proposed Plainville Mall.

ARGUMENT:

WEST FARMS PETITION SHOULD BE DENIED

West Farms has failed to carry its burden of demonstrating that the issues on appeal meet the test for review. Pursuant to Rule 10, Supreme Court review of a matter "will be granted only when there are special and important reasons therefor." In determining the question of review the court will examine the issues presented to determine if they raise questions of constitutional dimension, or novel questions relating to the interplay between state and federal law, or if there is a conflict among the circuit courts. *See, Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73-74 (1954); *Kossick v. United Fruit Co.,* 365 U.S. 731, 733 (1961); *Donaldson v. U.S.,* 400 U.S. 517, 522 (1971). When the issues presented fail to satisfy the mandate specified by Rule 10, certiorari has been denied. Here the issues presented by West Farms do not come within the ambit of Rule 10 and, therefore, the court should not grant its petition for certiorari.

West Farms raises several issues, all which are aimed at extracting a property right from Section 22a-19. West Farms raises the following issues:

1) Whether the right of an individual to file an administrative appeal under Section 22a-19 creates a property right;

2) Whether Connecticut law confers a property right upon West Farms under Section 22a-19;

3) Whether Section 22a-19 creates mandatory or procedural rights;

4) Whether Section 22a-19 confers a universal right shared by all citizens of the State of Connecticut or whether it confers a mandatory individual benefit for West Farms; and

5) Whether Section 22a-19 creates property rights enforceable through the "public trust doctrine."

To all of these issues, the answer is that Section 22a-19 does not confer any enforceable property right upon West Farms and West Farms has failed to demonstrate any authority to show otherwise. Further, none of the issues rise to the level of special or important to merit Supreme Court review under the standards established in Rule 10.

It is clear that West Farms recognizes the essence of clearly demonstrating a property right to sustain this lawsuit. *Morrissay v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Over the course of this lawsuit, West Farms has advanced a wide variety of claims to establish such a right with no success, and now has seized Section 22a-19 for their final stand. However creative West Farms advocacy of such issues, they have failed to establish any such property rights and have failed to satisfy the Rule 10 requirements.

As the Second Circuit correctly held, the language of Section 22a-19 is not mandatory, but rather, establishes certain procedural rights to allow intervenors the opportunity to be heard. In this regard, a person "*may*" intervene in an administrative proceeding to raise environmental issues within the agency's jurisdiction. *Connecticut Water Co. v. Beausoleil*, 204 Conn. 38, 45 (1987); *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247, 250 (1989). Further, once environmental issues are raised, the agency need only "*consider*" the information presented. Thereafter, the agency is free to act within its discretion and judgment in the consideration of such information.

Nothing in the statute confers individual mandatory benefits, but rather, allows individuals to proceed for the benefit of the general public as it is the public at-large who are the beneficiaries of the statute. Because the statute does not

create individual rights, no enforceable property rights are created under Connectcut law. *Connecticut Business and Industries Association, Inc. v. Commission on Hospitals and Health Care*, 214 Conn. 726 (1990).

West Farms primary reliance on *Hewitt v. Helms*, 459 U.S. 460 (1983) is inapposite and demonstrates the weakness of its arguments. Both the Second Circuit and District Court recognized the obvious differences between this lawsuit and *Hewitt*. In *Hewitt*, the Supreme Court found that a liberty interest was created by a statute which guaranteed no prisoner would be subjected to administrative segregation without a hearing. It was due to the express mandatory language of the statute that the rights were created. Section 22a-19's non-mandatory language and procedural guidelines bear no similarity to the statute in *Hewitt*. It is like comparing "apples and oranges".

In finding a property right, the courts must look to state law. *Board of Regents v. Roth, supra* at 408 U.S. 577. In Connecticut no such property rights have been created. In fact, in *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 478 n.5, 576 A.2d 510 (1990), the Connecticut Supreme Court noted that it has not yet decided the issue of whether Section 22a-19 creates a property right. Further, in *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 441 A.2d 68 (1981) cited by West Farms, no property rights were created or discussed, but rather in discussing procedural rights under Section 22a-19, the court made a vague reference to "substantive and procedural" rights, but did not elaborate or expand upon this statement. Finally, although Section 22a-19 was not at issue in *Double I Limited Partnership v. Plan and Zoning Commission*, 218 Conn. 65, 588 A.2d 624 (1991), the court found no property rights available to plaintiff under Connecticut law in circumstances substantially similar to this case. Hence, West Farms can point to no clear property right under Connecticut law.

Here, there is ample support for the proposition that section 22a-19 may create procedural rights while there is nothing to support any property rights. In examining the factors of whether to grant the writ, none exists here. First West Farms points to no conflict among the circuits. Second, there is no claim that either the Second Circuit or the District Court have departed from the accepted and usual course of judicial proceedings. Finally, there is nothing to support that the Second Circuit decided any federal question in conflict with the Connecticut Supreme Court. To the contrary, the Second Circuit's decision was in complete compliance with both state and federal law.[3] *See, Fusco v. State of Connecticut*, 815 F.2d 201 (2nd Cir.), *cert. denied* 484 U.S. 849 (1987); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2nd Cir. 1985).

[3] West Farms attempted to raise the "public interest doctrine" as creating a property right. However, this is nothing more than a different approach to fabricate a property right from section 22a-19. As has already been stated section 22a-19 creates no such rights and, therefore, offers nothing to support the granting of this writ.

CONCLUSION

West Farms petition for writ of certiorari fails to demonstrate that this matter raises any important or special issues or in any way meets the considerations listed in Rule 10. Therefore, the petition should be denied.

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